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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 689

PINELLAS BROADCASTING COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent,

and

THE TRIBUNE COMPANY,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1955

PINELLAS BROADCASTING COMPANY, *Petitioner,* v. FEDERAL COMMUNICATIONS COMMISSION, *Respondent,* and THE TRIBUNE COMPANY, *Intervenor.*	No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Pinellas Broadcasting Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled case on January 19, 1956.

OPINION BELOW

The opinion of the court below (Appendix A, *infra,* pp. 22-39) has not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 19, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

The Court of Appeals for the District of Columbia Circuit affirmed an order of the Federal Communications Commission denying the petitioner's application for a permit to construct and operate a television broadcast station on Channel 8 at St. Petersburg, Florida, and granting the conflicting application of The Tribune Company (Intervenor in the court below) for a station on Channel 8 at Tampa, Florida. The questions are:

1. Whether, in affirming the Commission's decision, the Court of Appeals abdicated its responsibility as the reviewing court under Section 402(g) of the Communications Act.

2. Whether the Commission's decision was arbitrary, capricious, and contrary to law, in that it—

(a) disregarded long-established statutory policies and reached a result inconsistent with its own decisions in comparable circumstances, by giving no preference to local (as opposed to absentee) ownership and integrated owner-management, and failing to make a comparative finding on diversification of control of mass communications;

(b) violated Section 310(b) of the Communications Act; and

(c) found petitioner's program proposals in part inferior to the Intervenor's without taking into account the distinct program needs of Tampa and St. Petersburg, and without evidence to support the finding.

STATUTE INVOLVED

The relevant provisions of the Communications Act of 1934, 47 U. S. C. 151, *et seq,* are set forth in Appendix B, *infra,* pp. 41-42.

STATEMENT

The petitioner, Pinellas Broadcasting Company, is a Florida corporation and licensee of Radio Station WTSP at St. Petersburg. The president and majority stockholder is Nelson Poynter, who is also the proprietor and editor of the principal local newspaper, the *St. Petersburg Times.*

The Intervenor below, The Tribune Company, is a Florida corporation and licensee of Radio Station WFLA at Tampa. Tribune publishes the principal Tampa newspaper, the *Tampa Tribune,* but over 80% of its stock is owned by individuals (members of the Bryan and Griffin families) living in or near Richmond, Chicago, and New York City. The Bryan family (owners of 52% of Tribune's stock) also own stock in and exercise voting control over two daily newspapers and a radio station (AM and FM) in Richmond (7580 and 7665).[1]

Pinellas and Tribune each filed applications with the Commission for a television construction permit for Channel 8, the former at St. Petersburg and the latter at Tampa. The two cities are twenty miles apart, and Pinellas and Tribune each propose transmitter locations from which both cities would receive service. The applications are

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[1]Unless otherwise indicated, all references are to the pages of the transcript of the record in the court below.

mutually exclusive. Pinellas proposes to locate its principal studio in St. Petersburg, and Tribune in Tampa.

On July 11, 1952 these applications were designated for hearing before an Examiner in a consolidated proceeding.[2] The Examiner's initial decision, released July 13, 1953, recommended that Tribune's application be granted and Pinellas' denied (7413-7470). Exceptions to the initial decision were filed by Pinellas and by the Commission's Broadcast Bureau (7479-85), and oral argument was held before the Commission.

On August 6, 1954, the Commission released its decision, reached by a vote of four members,[3] granting the application of Tribune and denying that of Pinellas (7574-7638). The majority's choice was exclusively based on a preference for the local live program proposals of Tribune (7632). The Commission expressly stated (7626) that ". . . in comparing Pinellas and Tribune no preference was extended on the basis of integration of local ownership and management and participation in community affairs." With respect to "diversification of control of the media of mass communication" the Commission made no comparative finding as between Tribune and Pinellas (7732).[4]

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[2]Also designated for hearing in the same proceeding was the competing application of the Tampa Bay Area Broadcasting Corporation for a station at St. Petersburg. Tampa Bay did not appeal from the Commission's denial of its application.

[3]Commissioners Webster and Bartley voted for Pinellas, and Commissioner Hennock for Tampa Bay.

[4]On the basis that both Pinellas and Tribune each controlled a newspaper in the same community with their respective radio stations, the Commission found that Tampa Bay warranted a preference "in this area of comparison", but that the preference "is not determinative of this proceeding" in view of other factors with respect to which Tampa Bay was found to be inferior to Pinellas and Tribune (7626, 7629, 7630 and 7632).

Thereafter, Pinellas filed with the Commission a petition for rehearing and associated pleadings (8609-8791, 8873-76, 7647-49, 8878-80) which were denied by the Commission's order of December 22, 1954 (7656-7665). Two Commissioners (Webster and Hennock) did not vote. Commissioner Bartley issued an opinion[5] (7663-65) explaining his preference for Pinellas as based upon the factors of "diversification of control of media of mass communication" and "integration of local ownership and management", and his belief that the record does not support a preference for Tribune's local live program proposals.

On January 19, 1956 the Court of Appeals for the District of Columbia Circuit (*per* Judge Prettyman with Judge Washington concurring and Judge Bazelon dissenting) affirmed the Commission's order (Appendix A, *infra*, pp. 22-40). The court rejected Pinellas' contention that the Commission had arbitrarily disregarded long-established policies favoring applicants that are locally owned and operated, declaring (*infra*, p. 25) that such matters "are political in the high sense of that abused term" and "are not for the judiciary". Pinellas' other objections likewise failed, and the court did not even advert to the issue of Tribune's lack of legal qualification to receive a television license under Section 310(b) of the Communications Act (*infra*, pp. 12-15), in view of the total abdication of management responsibility by Tribune's owner-directors.

Dissenting, Judge Bazelon neither accepted nor rejected the court's conclusions, saying (*infra*, p. 34) that: ". . . our

[5]Commissioner Bartley stated that he agreed with the majority that the petition for rehearing should be denied because (7663) "it is good administrative practice . . . to deny reconsideration of matters already considered and decided."

consideration of these contentions, and a final disposition of this review, should await a remand to the Commission for the purpose of supplying an essential conclusion which is missing from the present record. This conclusion relates to the issue of concentration of control and diversification of the media of mass communication".

REASONS FOR GRANTING THE WRIT

Ever since its establishment over twenty-one years ago, the Federal Communications Commission has interpreted the "public convenience, interest, or necessity" standard of the Communications Act as favoring local rather than absentee ownership of broadcasting facilities, and owner-responsibility for station management and operations.[6] Now in this case—the first involving competing applicants for a television license to reach this Court—the Commission has abruptly and arbitrarily discarded these and other time-tested standards of comparison, and has reached a result wholly incompatible with its previous policies and decisions. See, *e. g., Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 189 F. 2d 677 (1951). Furthermore, it has rendered a decision inconsistent with the requirements and purposes of the Communications Act of 1934 and for which, viewing the record as a whole, there is no evidentiary support.

The petitioner fully recognizes that there is a wide range of administrative discretion under the Communications Act. Within this range the Commission must be free to adapt its policies to changing circumstances and evalua-

[6]This interpretation has been applied in at least 126 Commission decisions over the course of these years (8442-46).

tions, and the courts must allow the Commission the latitude necessary for flexible as well as firm administration. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 211; *cf. Securities Commission* v. *Chenery Corp.*, 332 U. S. 194, 203. But changes in policy must be orderly and reasoned,[7] as must all other Commission action within its range of discretion, including choice among competing applicants. See *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 226. And once policies have been established, the Commission can not arbitrarily pick and choose cases in which they should be applied or disregarded; it must "play within the rules" that it has itself worked out. See *National Labor Relations Board* v. *Mall Tool Co.*, 119 F. 2d 700, 702.

The majority of the court below, in its solicitude for administrative discretion, has overlooked its ". . . responsibility to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest." *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86, 91. Interpretation of the statutory "public interest" standard may involve what Judge Prettyman below called "political" factors (*infra*, p. 25), but these are by no means beyond the purview of judicial scrutiny. The decision below is in sharp contrast with one recently rendered by another division of the Court of Appeals, where the Commission's handling of comparably "political" issues was

[7]This is, of course, equally true irrespective of whether the change of policy is announced in a general rule-making or a specific license proceeding. *Cf. Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 421.

scrutinized and disapproved. *Clarksburg Pub. Co.* v. *Federal Communications Commission,* 225 F. 2d 511 (1955).

In this case the Court of Appeals has failed to fulfill its responsibilities as the reviewing court for decisions of the Federal Communications Commission. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474. The numerous comparative television application proceedings now pending in both the Court of Appeals and the Commission[8] underline the importance of this Court's review of the questions presented by this case.

1. *Local Ownership.* It is undisputed that petitioner is a local enterprise (1908-18, 5843, 5847-48, 7584). Pinellas' owner is, in the Commission's words in a parallel case: ". . . deeply rooted in the life of . . . [St. Petersburg] and . . . representative of practically every phase of public activity in that city." See *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 189 F. 2d 677, 682. Equally beyond dispute, the principal owners and a majority of the directors of Tribune live hundreds of miles from Tampa, and play no part whatever in community affairs or the management of their broadcasting enterprises (7579-80). Management of The Tribune Company and its newspaper is exercised by a paid "management group" of five Tampa residents, and one of these (who is not even a director of Tribune) and the station manager (hired from outside of Tampa) exercise effective control of broadcasting operations (775, 874, and 1586-87).

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[8]In addition to ten appeals involving seven channels that are pending in the Court of Appeals, there are (according to the docket entries at the Commission) thirty-two comparative proceedings, involving as many channels, pending before the Commission at various stages of completion.

There is no question of Pinellas' qualifications, or of the excellence of its record as a radio station licensee (7595-97, 7632). Under long-established statutory policy and many prior decisions, Pinellas, as a local enterprise, is entitled to a substantial preference as compared to Tribune. But the Commission declined to give this preference,[9] on the ground that local ownership is not a substantive value *per se*, but is merely the basis for a "presumption" that the applicant will be responsive to community needs (7625-26). In the present case, said the Commission, Tribune's record as a radio station licensee shows that it has been responsive in this respect, and this record offers a sufficient basis for presuming future good service as a television licensee. The Commission further stated that since both Pinellas and Tribune may be expected to give good community television service, there is no reason to give Pinellas a preference based on its local ownership. Evenly balanced at this point, the Commission then awarded a decisive preference to Tribune on the ground that its proposed schedule of local live programs was superior.[10]

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[9]In its decision, the Commission stated categorically that it was giving Pinellas *no preference* on the basis of local ownership (7626). In its opinion on petition for rehearing, the Commission stated that its decision had given Pinellas a "slight" preference which "although not separately stated, was considered" (7658-59). It seems apparent that this was an afterthought designed to shore up the decision. *Cf.* Judge Bazelon's comments on the obvious discrepancy, *infra*, pp. 33-34.

[10]It is important to bear in mind that this is *not* a case in which the Commission awarded the normal preference to local owner-management, but found it outweighed by the absentee applicant's superiority in other respects. Rather, the Commission depreciated the weight of the local owner preference to the vanishing point so that any other factor, no matter how ephemeral (as indeed it was here, *infra*, pp. 16-20), would tip the scales. Whereas, *e.g.*, in the *Scripps-Howard* case, *supra*, the Commission awarded the license to the local and integrated applicant, despite its finding that the unsuccessful absentee applicant had better program proposals, more broadcasting experience, and greater financial strength.

Now, this demotion of local ownership from an important substantive value[11] to a mere presumption, the effect of which can be wholly dissipated if a rival applicant shows a good record as licensee of another station, finds no support in the structure and objectives of the Communications Act and is flatly contrary to the policy derived from the Act and applied by the Commission since its inception.[12] The Communications Act makes careful provision for the equitable distribution, among states and communities, of radio *service*[13] 47 U. S. C. 307(b). This does not mean merely a geographical distribution of transmitting facilities, but also of the use and control of those facilities. See *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 283, 285.

Under the Commission's decision here, absentee ownership of broadcasting stations could be justified to an unlimited extent as long as hired managers respond to community interests. The dangers of such a theory,[14] and its

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[11]Local ownership is, of course, not an absolute requirement but a favoring circumstance for an applicant. Likewise, it can be outweighed by other policy factors. But it does have substantial weight *per se*, which the Commission has often found decisive, even in the face of other comparative deficiences, as in the *Scripps-Howard* case, *supra*.

[12]The Commission has sought to rely on two prior decisions as precedents for its action in the present case. *Hearst Radio, Inc.*, 6 R. R. 994 (1951); *WJR, The Goodwill Station*, 9 R. R. 227 (1954). But in the *Hearst* case, decided by only three commissioners, the locally-owned applicant was seeking to oust an existing radio licensee, and in the *WJR* case neither rival applicant was locally owned. The present case is the first in which a fully-qualified, locally-owned and owner-managed applicant has been rejected in favor of an application from absentee owners who play no part in the management of their broadcasting properties.

[13]In addition to Section 307(b), other provisions of the Communications Act clearly envisage distribution as opposed to concentration. See, *e.g.*, 47 U. S. C. 303(i) and 314.

[14]*Cf.* Woodrow Wilson *The New Freedom* (1913), quoted in Heffner, *A Documentary History of the United States* (1952) at pp. 221-22, wherein Wilson warned against the "un-American" conse-

incompatibility with the purposes of the Communications Act, are obvious. Furthermore, *assurance* of attention to community matters is by no means the only value inherent in local ownership. A more intimate and sensitive *appreciation* of community needs is likewise to be expected, as the Commission itself has repeatedly recognized.[15]

Most important of all is the value of *participation*. The community, after all, is not merely the recipient—the listener or viewer—of the station's broadcasts; the community's institutions and members are also a source of the matter to be broadcast. The station is a means by which the community communes. To say, as did the Commission majority in this case, that this need can be satisfied equally well by a station owned and controlled by strangers to the community and operated by a hired local manager, is to undermine one of the most important purposes of the Communications Act.

The Commission's decision here is not only contrary to the statutory purpose and its own prior actions; it is wholly out of keeping with Congressional and administrative practice in other fields where Congress has also sought to ensure a measure of decentralization in the control of a public or semi-public facility. Examples which come readily

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quences of permitting the development of: ". . . a network of control that will presently dominate every industry in the country, and so make men forget the ancient time when America lay in every hamlet, when America was to be seen in every fair valley, when America displayed her great forces on the broad prairies, ran her fine fires of enterprise up over the mountain sides and down into the bowels of the earth, and eager men were everywhere captains of industry, not employees; not looking to a distant city to find out what they might do, but looking about among their neighbors, finding credit according to their character, not according to their connections . . .".

[15] *E.g. Julio M. Conesa*, 11 F. C. C. 200, 210; *Midland Broadcasting Co.*, 12 F. C. C. 611, 622.

to mind include the laws pertaining to branch banking,[16] civil aeronautics,[17] homesteading and farm credit.[18]

It is clear, we submit, that in this case the Commission has grossly misapplied the pertinent statutory standard, and has departed from established policy in an arbitrary manner. See *National Labor Relations Board* v. *Mall Tool Co.*, 119 F. 2d 700, 702; Note 64 Harv. L. Rev. 947, 957. Judicial review and reversal of its decision are plainly necessary.

2. Licensee Responsibility and Section 310(b) of the Communications Act. Closely related to the preference for local ownership is the policy favoring management of broad-

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[16]See the original national banking laws of 1863 (12 Stat. 665) and 1864 (13 Stat. 118) and the Act of February 25, 1927 (44 Stat. 1228, 12 U. S. C. 36), as well as H. Rep. 1425 on H. R. 13363, 57th Cong., 1st sess. In 1930 George W. Davidson, President of the Central Hanover Bank and Trust Co., and Benjamin Anderson, Jr., staff economist of the Chase National Bank, testified emphatically in support of continued restrictions on branch banking in order to preserve the benefits of community financial independence. See the Hearings of the House Committee on Banking and Currency on H. Res. 141 (71st Cong., 2d sess.) pp. 1781, 1784-85, 1790, 1863, and 1868). As the Hon. Henry Dawes, Controller of the Currency, once put it (Cong. Rec., 68th Cong., 2d sess. p. 1579): "Banks are the trustees for the funds of a community. In case of the branch bank the trustees are not residents and they are not influenced by the community's desires and necessities as is the case at the present time where the officers and owners are residents in and the product of the community they serve. This sort of an operation [branch banking] runs directly counter to that instinct of the American people which demands independence in matters of local self-government."

[17]Civil Aeronautics Act of 1938 as amended, 49 U. S. C. 401 *et seq.*, especially sections 402 and 481. See the *West Coast* case, 6 C. A. B. 961; the *Florida* case, 6 C. A. B. 765; the *Southeastern* case, 7 C. A. B. 863; *The Rocky Mountain States Air Service*, 6 C. A. B. 695.

[18]See Hacker, *The Triumph of American Capitalism* (1946) pp. 368-69; Robert J. Bulkley, *The Federal Farm-Loan Act* in the Journal of Political Economy for February, 1917.

casting facilities by the licensee-owner, rather than by delegation to others—referred to by the Commission as "integration of ownership and management." Indeed, the Commission has been disposed to treat integration as an even weightier policy factor than local ownership,[19] and the reason for this is not far to seek. Section 310(b) of the Communications Act specifically prohibits the transfer of a license "or any rights thereunder" without application to and approval by the Commission.

If a licensee were free to delegate his responsibilities, the entire scheme of the Act would be undermined and the public interest standard nullified. Therefore the Commission has refused to grant or renew licenses where an unlawful or undesirable delegation had been effectuated or proposed, and in comparative proceedings has consistently preferred applicants showing a high degree of integration.[20] There is no question about the validity of the Commission's interpretation of the law and established policy in this respect. *Simmons* v. *Federal Communications Commission,* 169 F. 2d 670; *cf. Regents of University* v. *Carroll,* 338 U. S. 586.

Where the licensee or applicant is a corporation and the controlling stock is closely held, as is true of Tribune, licensee responsibility attaches to the controlling owner-directors.[21] Four of Tribune's six directors control 83% of the stock; not one of the four lives near or plays any part in the affairs of Tampa or Tribune (7578-81), and

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[19]*St. Andrew Bay Broadcasting Co.,* 4 R. R. 871; *FM Radio & Television Corp.,* 11 F. C. C. 775; *WJPS, Inc.,* 12 F. C. C. 121.

[20]*Westinghouse Electric and Manufacturing Co.,* 8 F. C. C. 195; *WOAX, Inc.,* 4 R. R. 344; *Georgia School of Technology,* 10 F. C. C. 110 and 11 F. C. C. 71; *Master Broadcasting Corp.,* 6 R. R. 621.

[21]*Royal Broadcasting Corp.,* 6 R. R. 717.

not one appeared or testified at the hearing on Tribune's application. Not a single member of the board of directors is qualified to testify about Tribune's broadcasting operations (775, 806, 812-13, 818-19, 880-81, 5786-90). The board "generally concerns itself with fiscal policies" and does not concern itself with programs or other questions of station management and policy (880-81, 941-42, 1566-68).

It is the hired manager who, subject to sporadic (874) supervision by a vice-president (a very small stockholder in but not a director of Tribune), runs the broadcasting enterprises of Tribune (1297, 1461). The evidence at the hearing eloquently demonstrated the unhappy results of this absentee landlordism.[22] In circumstances far less flagrant, the Commission has rejected applicants as legally unqualified to receive licenses, on the ground of their failure to meet the requirements of licensee responsibility implicit in Section 310(b) of the Act.[23]

In the present case, however, the Commission reduced integration, like local ownership, to the level of a "presumption" and, despite Pinellas' complete integration of ownership and management and Tribune's complete lack of it, gave no preference to Pinellas. This action was an arbitrary

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[22]These results were manifest not only in the failure of any of the owner-directors to appear at the hearing, but in the lack of any supporting testimony from the community of Tampa, other than Tribune's own employees. Even more significant, there was undisputed testimony at the hearing that Tribune's radio station had engaged in fraudulent "clipping" practices (shortening the duration of paid commercial announcements in order to squeeze more of them into the available time) which had persisted for several months precisely because the former station manager was operating without supervision by any owner, director, or responsible officer of Tribune (1422-24, 1595, 1604-05, 1610-14, 4439).

[23]See *e.g., Royal Broadcasting Corp., supra; Southern Tier Radio Service, Inc.*, 11 F. C. C. 171.

reversal of established policy, and a violation of Section 310(b) of the Communications Act.

3. *Diversification.* Yet another long-standing policy of the Commission has been discarded by the Commission in its choice between Pinellas and Tribune. The policy of favoring diversification and guarding against concentration of control of the media of mass communication has long been embodied both in rules relating to multiple ownership of broadcasting stations and chain broadcasting, and in general standards of comparison as between competing applicants.[24]

Pinellas did not rely on this factor in the hearing before the Commission or in the court below. Judge Bazelon, dissenting, declared that the Commission could not (*infra*, p. 36) "disregard issues of vital importance to the public interest simply because they are not presented by the parties".[25] He also thought that the reviewing court was in duty bound to require the Commission "to discharge its proper function" by exploring and determining this unresolved comparative factor (*infra*, pp. 36 and 38-39); the majority did not deny that the court had power so to require, but held (*infra*, pp. 29-30) that "no such action is called for in the present case".

Judge Bazelon's view finds compelling support in the structure and theory of the Communications Act as interpreted by this Court. See *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 215-16; *cf. Associated Press*

[24]See *e.g., Multiple Ownership*, F. C. C. Report and Order, 18 Fed. Reg. 7796-97.

[25]The Commission in fact awarded a preference to the third applicant (Tampa Bay) on this basis, but made no finding as between Pinellas and Tribune (7631-32).

v. *United States*, 326 U. S. 1, 20. It is further buttressed by a recent decision of another division of the court below, and the views of writers on administrative law. *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 511; see Davis, *Administrative Law* (1951) 476-83; Landis, *The Administrative Process* (1938) 39.

Although the Commission has made no finding on the diversification issue as between Pinellas and Tribune, it is clear from the record that there is a noteworthy difference favorable to Pinellas. For while Pinellas' principal owner and Tribune each publish a newspaper in their respective communities, the controlling stockholders of Tribune also control two daily newspapers and a radio station in Richmond (7580).

It is clear, therefore, that Pinellas merited a preference over Tribune on the factor of diversification, as Commissioner Bartley noted in his opinion on rehearing (7665). In failing to give comparative consideration to this matter, the Commission acted arbitrarily and in violation of its settled policy under the statutory standard, and the judgment below must therefore be reversed.

4. *Unsupported Preference for Tribune's Local Live Program Proposals.* The signal errors of commission and omission discussed above would not be justified even if there were adequate evidentiary support for the Commission's preference for Tribune's local live program proposals, which was the sole and governing basis of its decision (7632). In fact there is no sufficient basis for this conclusion, which is also vitiated by the Commission's failure to take into account the distinct community characteristics and program needs of St. Petersburg and Tampa.

The Commission considered six categories[26] of local live programs; its general finding that Tribune proposed "a more extensive schedule" (7629) is based on a comparison in two of these categories (agriculture and education) favorable to Tribune (7628). Commissioner Bartley thought that there was no basis for preferring either Tribune or Pinellas, as (7664) "an examination of the program proposals in their totality reveals that basically they are similar."

It may be observed in passing that, unless there are very marked differences in overall program resources and plans, preferences based on time percentages and descriptions of particular proposed programs, in schedules prepared for use at a comparative hearing long before the commencement of actual operations, are likely to prove ephemeral and delusive in a field so fluid as television. The Commission itself has recognized this manifest truth in other decisions, wherein the importance of the details of program proposals is considerably discounted.[27]

In scrutinizing rival applicants' program proposals, moreover, the Commission is surely bound to consider the composition and needs of the intended audience. Tampa and St. Petersburg, twenty miles apart and separated by the waters of Tampa Bay, are dissimilar communities; as the Commission found (7576), Tampa is "basically a year-round industrial, commercial and transportation center",

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[26]News, sports, religion, education, agriculture, and women.

[27]See, *e.g.*, *The Enterprise Co.*, 9 R. R. 816, 818f-g and y-bb. At p. 818f the Commission said: "The task of choosing among competing applicants on the basis of comparative analyses of proposed program service is a difficult one, especially where . . . programming plans are often prepared months or even years in advance of the time when a station can be placed in actual operation."

while St. Petersburg is "primarily a retirement and resort community and the home to permanent and semi-permanent retirees and a winter resort for tourists". The Commission also determined (7622-23) that, although Pinellas and Tribune each propose a television service that would cover both cities and the adjacent communities, the *principal* service of each must be to the community in which the main studio is located,[28] in order to carry out the Commission's "fundamental purpose of . . . furnishing of television service to individual communities."[29]

These eminently sound postulates were totally overlooked, however, when the Commission undertook to compare Pinellas' and Tribune's proposed programs.[30] Obvi-

[28]The court below erroneously concluded that (*infra*, p. 28) ". . . the Commission treated Tampa-St. Petersburg as one community, not as two". Presumably the court overlooked the categorical statement in the Commission's decision (7623) that: "The assignment of television channels to Tampa-St. Petersburg is improperly interpreted if construed to mean that these channels are for the joint use of both communities . . . each applicant by the selection and location of its main studio indicated which community is to be considered as the principal community to be served."

[29]To be sure, a broadcasting station's overall service should ordinarily reflect the needs of the entire area that it serves (taking due account of service available from other stations), but it is also bound to regard the community where its principal studio is located as the principal audience and govern its programming accordingly (7622-23). See *Easton Publishing Co.* v. *Federal Communications Commission*, 175 F. 2d 344, 348-49.

[30]It should be noted that petitioner's contention here is not, as the court below mistakenly concluded (*infra*, pp. 27-28), based on Section 307(b) of the Communications Act, requiring an equitable distribution of radio service. The contention is simply that the quality of a program is not an absolute but is in relation to the audience for which it is intended. For example, two adjacent communities, one with a large Spanish-speaking population component, may have equal need of radio service under Section 307(b). If only one channel is available to two applicants, one from each community, the Commission must keep in mind the special needs of the Spanish community in comparing the program proposals of the two rival applicants. That is what the Commission failed to do in the present case, but this error has nothing to do with Section 307(b) of the Act.

ously the educational needs of a relatively stable commercial community such as Tampa are quite different from those of a rapidly-growing tourist and retirement resort with a high proportion of elderly and leisure-rich inhabitants such as St. Petersburg. Pinellas' educational program proposals reflect its primary concern with the composition and needs of St. Petersburg (*2292 et seq.*, 6360, 7610), as do its agricultural, sports, news, and other local live program proposals.

But the Commission's analysis betrays no awareness of the importance of the audience as well as the program when comparing the service.[31] Thus its own declared intention to foster community service is frustrated for failure to distinguish one community from another. So fundamental an oversight deprives the Commission's preference for Tribune's program proposals of any reasoned basis. See *Democrat Printing Co.* v. *Federal Communications Commission*, 202 F. 2d 344, 348-49.

The upshot is anomalous indeed. The Commission has preferred the local live program proposals of an applicant which did not bring forward a single witness from the community to testify in support of its proposals. The Tribune presented an arid, synthetic "paper case" based on letters solicited for the purpose (1142, 1303-04, 5546-5745), and it is plain on the record that its owners' interests in Tampa's television service are strictly those of the absentee landlord. Pinellas, in contrast, is a home-grown institution, and

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[31] Furthermore, the Commission took no account of television service otherwise available to Tampa and St. Petersburg. The other commercial VHF channel (13) has also been awarded to a Tampa applicant; channel 3 is reserved for non-commercial educational use and UHF channel 38 is utilized by the municipality of St. Petersburg (7574).

numerous community leaders came forward in behalf of its past record and television program plans and testified to the initiative, imagination, and community spirit demonstrated by Pinellas in fields such as education, political discussion, health and recreation (2233-35, 2254-55, 2267-74, 2279-81, 2292-93).

Petitioner submits, accordingly, that there is no basis in the record of this proceeding for the Commission's preference for Tribune's application on the sole basis of the respective local live program proposals, and that the decision is in this respect, as in others, arbitrary and unsubstantiated by the evidence.

CONCLUSION

The Commission's task of choosing between competing applicants for radio and television licenses is difficult and often thankless. The comparative qualifications of applicants cannot be measured with rule or scale and many of the pertinent and sometimes conflicting policies are imponderable.

But in the long run, the Commission can best overcome the difficulties that confront it by adhering to solid and enduring policy factors.[32] One of the principal purposes of

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[32]It is impossible to discern any rational pattern in the Commission's recent decisions in comparative television proceedings, insofar as in the present case the most trivial differences in program proposals are exalted into a determining factor of such great importance as to outweigh traditional factors such as local owner-management, while in others the significance of program plans is minimized and other elements are given great weight. Compare the decision in this case with, *e.g.*, *The Enterprise Co.*, 9 R. R. 816; *KTBS, Inc.*, 10 R. R. 811, 869; *WKRG-TV, Inc.*, 10 R. R. 225, 268; *Sacramento Broadcasters, Inc.*, 10 R. R. 615, 642g; *Evansville Television, Inc.*, 11 R. R. 411, 451.

judicial review of the Commission's decisions is to preserve a climate, of consistent reliance on basic policy, that is the best guardian of high administrative standards. Decisions such as the one here under review urgently require judicial correction so as to maintain such standards.

Respectfully submitted,

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February , 1956.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12545

PINELLAS BROADCASTING COMPANY, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
THE TRIBUNE COMPANY, INTERVENOR

Appeal from the Federal Communications Commission

Decided January 19, 1956

Mr. Telford Taylor, with whom *Mr. Neville Miller* was on the brief, for appellant. *Mr. John B. Kenkel* also entered an appearance for appellant.

Mr. Warren E. Baker, General Counsel, Federal Communications Commission, with whom *Mr. J. Smith Henley,* Assistant General Counsel, Federal Communications Commission, was on the brief, for appellee.

Mr. Philip J. Hennessey, Jr., for intervenor. *Mr. Edwin S. Nail* also entered an appearance for intervenor.

Before PRETTYMAN, BAZELON and WASHINGTON, Circuit Judges.

PRETTYMAN, *Circuit Judge*: This is an appeal from an order of the Federal Communications Commission.[1] The order contained an award of a permit to construct a television station on the West Coast of Florida to operate on Channel 8. The area to be served included Tampa on the north and St. Petersburg on the south. Three applicants competed for the award—the Tribune Company located at Tampa, Pinellas Broadcasting Company located at St. Petersburg, and Tampa Bay Area Telecasting Corporation with a studio located between the other two. The award was to Tribune. Pinellas is our appellant. Tampa Bay takes no further part in the proceeding.

The administrative proceeding was meticulous in its procedural detail, beginning with a hearing before an examiner and ending with a denial of reconsideration by the Commission.

The Commission made extensive and detailed findings of facts and explained at great length its choice of the awardee. In respect to many criteria it found little or no advantage to any applicant; in respect to some it found advantage to one; and in respect to others is found advantage to another. The decisive factor, in its judgment, was the comprehensive local live program proposal of Tribune, supported by the record it had made over the years, both in its newspaper and in its radio broadcasting, in furtherance of local civic interests and enterprises. Each of the groups owning these applicants has for years owned and operated a newspaper and a radio station in this locality under the same ownership and in the same manner as it proposes for the new television station. Ex-

[1]Sec. 402(b) of the Communications Act, 48 STAT. 926 (1934), as amended, 47 U.S.C.A. § 402(b).

tensive evidence concerning the respective performances in the use of these media was presented. The Commission rested upon that factual basis. It found that Tribune proposed a greater quantity of local live programming and that in content and the assurance of effectuation of the proposal Tribune was clearly and strikingly superior.

In applying this decisive factor the Commission refused controlling effect to the local ownership of Pinellas contrasted with the absentee ownership of Tribune. Therein, Pinellas says, it erred. Pinellas states its contention in a number of ways,[2] but in essence it is that the Commission erroneously failed to give preferential weight to Pinellas's superiority to Tribune in terms of local ownership and integration of ownership and management.

Tne facts on the point are that the stock of Pinellas is wholly owned by residents of St. Petersburg active in the management of the corporate affairs, whereas 90 per cent of the stock of Tribune is owned by non-residents of the area, principally by two families resident in Richmond and Chicago. The conduct of the affairs of Tribune has for many years been entrusted by the owners to a group of local residents as officers and active managers. The Commission found the stockholders of Tribune maintained a policy of autonomy in the management of the company's affairs in local officers having no other business interests.

The Commission says the prime factor in this particular phase of a comparative consideration is the presentation of programs of local interest and importance and, while local ownership is a fair assurance of the performance of promises made by applicants for such programs, and for

[2] *E.g.*, it argues that Tribune has abdicated its owner responsibility.

that purpose is a valuable factor in many comparative judgments, such ownership is not a prime factor in itself and where, as here, an extensive record of performance is available, the record is a more reliable guide to the probability of fulfillment of promises. The same is true in respect to the integration of ownership and management.

The controversy is in an area into which the courts are seldom justified in intruding. The selection of an awardee from among several qualified applicants is basically a matter of judgment, often difficult and delicate, entrusted by the Congress to the administrative agency. The decisive factors in comparable selections may well vary; sometimes one applicant is superior to another in one respect, whereas in another case one applicant may be superior to its rivals in another feature. And it is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes. Two diametrically opposite schools of thought in respect to the public welfare may both be rational; *e.g.,* both free trade and protective tariff are rational positions. All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term. They are not for the judiciary.

In the case at bar there appears some suggestion that the Commission has changed, or is changing, its view as to the dominant importance of local ownership and as to the evil of a concentration of the media of mass information. But in so doing it is operating within the area of legislative-executive judgment. The courts cannot interfere so long as the process, the premises, and the judg-

ment are not arbitrary. The rationality of some basic theses as to the public good is self-evident, and of some others is so well known as to require judicial notice. But it may sometimes be that the supporting philosophy of a general policy on such matters is so obscure as to require explanation. In such a case, if the conclusion is challenged as arbitrary, it would seem that the court, in the process of adjudicating that issue, can require a statement of the premises for and the reasoning toward the general policy. But we do not have that situation in the case at bar. No statutory provision has been violated. The bases for the Commission's selection are clearly set out and are understandable. They are reasoned and not capricious. They rest upon evidence put in the record. All parties had complete procedural opportunities. So far as the record shows, the Commission considered every suggested index of differences between the applicants. The function of the court in this case goes no further than to examine into these features of the matter.

In its brief Pinellas urges as error the lack of findings as to the relative needs of Tampa and St. Petersburg, as two separate communities, for service and the relative abilities of the applicants to meet each of those needs. Pinellas was not direct or specific upon the point in the proceedings before the Commission, so far as those proceedings are printed in the joint appendix. To discover the point in that text one must discover it in the general claim that the Commission erred in finding Tribune's program proposals superior to those of Pinellas. We advert to the point briefly, although ordinarily we do not, and will not, decide issues not presented observably to the agency.

Section 307(b) of the Communications Act[3] requires a fair and equitable distribution of radio service "among the several States and communities". Rulings of the Commission[4] make clear that it regards as a specific issue the question whether license applications require consideration under this section; that is, whether more than one "community" is involved and, if so, the elements of a fair and equitable distribution. No such issue was posed by Pinellas. Indeed Pinellas expressly disclaimed that Section 307(b) was involved in the case.

Pinellas seeks to avoid its failure to raise an issue under Section 307(b) (and to explain its disclaimer) by urging that such an issue is posed only where the question is which of several communities is to receive service to the physical exclusion of the others. It says no such issue is present here. Instead it argues that, where two applicants are located in distinct communities within the same broadcast area, each serves not only the area as a whole but, principally, the community within which it is located; and that therefore comparison of the program proposals of such applicants must be predicated upon findings as to the suitability of their proposals to the communities principally served. Pinellas points to certain language contained in paragraphs 7 8 and 9 of the Commission's Conclusions as supporting this view but claims that the required findings were never made. We think Pinellas misconceives both the scope of Section 307(b) and the language of the Commission.

In requiring a fair and equitable distribution of service Section 307(b) encompasses not only the reception of an

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[3]48 STAT. 1083 (1934), as amended, 47 U. S. C. A. § 307(b).

[4]Head of the Lakes Broadcasting Co., 9 PIKE & FISCHER R. R. 1072 (FCC 1953); Lufkin Amusement Co., 8 PIKE & FISCHER R. R. 518, 666 (FCC 1952).

adequate signal but also community needs for programs of local interest and importance and for organs of local self-expression. The rules and regulations of the Commission and its decisions demonstrate that it so regards the section. So, if Pinellas wished to press a point that in respect to opportunity for local expression the Tampa-St. Petersburg area is two communities, it should have presented the issue to the Commission. It cannot urge it here for the first time.

Pinellas says the Commission expressly recognized the necessity for comparative consideration of the applicants as principally serving distinct and separate communities. It says that, while the Examiner treated Tampa-St. Petersburg as a single community, the Commission expressly held that view erroneous. We find no such holding.

It is clear the Commission treated Tampa-St. Petersburg as one community, not as two. All applicants proposed a station that would render Grade A service to a wide area, including both Tampa and St. Petersburg as its center. And as to program availability the Commission was emphatic that the proposals must meet the local needs of the area, not of one separate segment of the area; it went so far as to note specifically "Tribune's manifested desire to meet the program needs of St. Petersburg as well as Tampa".

Pinellas seeks to pin its point upon a portion of the Commission's discussion of the proposed studios of the applicants. The Examiner had found that Tribune's proposed main studio would be more centrally located and more accessible to the people in "the area at large", and so he gave Tribune a preference on that ground. The Commission disagreed and held the Pinellas and Tribune studios would be equally available to the community at

large. In the course of its discussion the Commission ventured upon some explanation of its Rule 3.613,[5] which permits for good cause shown the location of a main studio outside the "principal community to be served". Referring to Tampa-St. Petersburg it used the expressions "both communities" and "either community". The language of that discussion may be confusing, and the subject itself may be inherently difficult. An area which is one community for reception purposes, because the prime signal will be received equally well throughout the area, may be several communities for transmission purposes because of distinct needs as to local expression. And so one "community" may be several "communities". But, where each of several applicants proposes not only area-wide signal reception but also area-wide expression opportunities, the problem of separate "communities" does not necessarily arise. There is nothing in these portions of the Commission's decision which departs from, or even throws doubt upon, its basic view and holding that this is a one-community case.

Pinellas makes some contention with respect to the record of past comparative participation in local affairs, but the evidence on the point was sweeping and the finding of the Commission was precise and definite. We cannot evaluate such evidence beyond assuring ourselves the conclusion of the Commission had ample support. We think it had.

It may well be that the courts can require an administrative agency to reconsider a decision in which important matters affecting the public interest have not been canvassed or explicitly decided by the agency, even where

[5] 47 C. F. R. § 3.613 (Rev. 1953).

those questions have not been urged by any litigant before the agency or the courts. But we think no such action is called for in the present case. The final action of the Commission here finds adequate support in the record and does not appear in any respect to be clearly contrary to the public interest.[6]

The order of the Commission must be

Affirmed.

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[6]In reaching this conclusion we have not overlooked the Commission's treatment of the subject of diversity of media of mass communication. That treatment, which was not complained of by Pinellas either here or before the Commission, is reflected by the excerpt from the Commission's decision given in the Appendix to this opinion.

APPENDIX

Excerpt from conclusions reached by the Federal Communications Commission in its decision of August 4, 1954:

21. The Commission ordinarily will incline toward an applicant not associated with the local channels of communication of fact and opinion over an applicant having such association. However, such affiliation does not exclude that applicant from comparative consideration. Although it is an important factor it must be weighed along with all other considerations to determine which of the comparative applicants might best serve the public interest. The facts relating to this area of comparison briefly are as follows: Tribune publishes one of the two English language newspapers in Tampa; it is the licensee of Station WFLA, one of the two 5 kw unlimited time stations in Tampa. In addition, there are two Spanish language newspapers and three daytime only stations in Tampa. The controlling stockholders, namely, the Bryan family, have controlling interests in two daily newspapers published in Richmond, Virginia; Radio Station WRNL-AM and FM, Richmond; and in an applicant for a television station in Richmond. Tribune plans to separate the operations of the radio and television stations except insofar as heads of certain departments and sections who will function for both. Pinellas is the licensee of Station WTSP, one of the two 5 kw unlimited time stations in St. Petersburg. There is also a daytime only station in St. Petersburg. Mr. Poynter, Pinellas' principal stockholder, is also controlling stockholder of The Times Publishing Company which publishes one of the two daily English language newspapers in St. Petersburg. Pinellas proposes to operate its television station as a separate unit. Tampa Bay has no affiliation with any other established media of mass commu-

nication in the area. Messrs. Hal James, Bennett and Houseknecht are stockholders in Station WVET, Rochester, New York, which is also an applicant for a television station in Rochester.[2] One other stockholder, A. Waller Smith, is a minority stockholder and director of licensee of Station WTAN, Clearwater, Florida.

22. The Commission, in the past has held that diversification of control of the media of mass communication is desirable and that in the absence of countervailing considerations, the grant to an applicant who has fewer broadcast interests or is not affiliated with other radio or newspaper interests better serves the public interest. This factor, important as it may be, is only one of the numerous comparative factors we have weighed in reaching our decision. The weight to be accorded this factor is dependent upon the circumstances of each case. This record shows that neither Pinellas nor Tribune proposes or intends to employ joint rates in the sale of television time; that there is no indication that the operation of a television station by either Tribune or Pinellas would lessen effective competition; that there are competing radio stations and newspapers now operating in Tampa and St. Petersburg as well as a variety of media in the proposed area to be served; and that both have demonstrated their capacities to function in the public interest. Under these circumstances, we conclude that even though Tampa Bay warrants a preference over Tribune and Pinellas in this area of comparison, it is not determinative of this proceeding. See *Aladdin Radio and Television, Inc.*, 9 RR 1.

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[2]The Commission records show that Veterans Broadcasting Company, Inc. was granted a construction permit to operate on Channel 10 on a share time basis. WVET-TV started commercial operation on November 11, 1953.

BAZELON, *Circuit Judge*, dissenting: Tribune and Pinellas filed mutually exclusive applications for the television channel assigned to the Tampa-St. Petersburg area under the Commission's allocation plan.[1] These cities are twenty miles apart. Tribune, which proposed construction of a station in Tampa, is controlled by Richmond, Chicago and New York residents who will take no part in managing broadcasting operations. Pinellas, which proposed construction of a station in St. Petersburg, is owned by local residents who will manage all the station's affairs. In granting the application of Tribune, the Commission disregarded local ownership and ownership-management integration as values in themselves worthy of a preference. It chose to rely instead upon the past broadcast performance records of the applicants as a more reliable guide for determining which one would be more likely to effectuate its program proposals. The Commission found that both Pinellas and Tribune had "past desirable performance" records.

In its decision, the Commission stated that it had awarded "no preference [to Pinellas] . . . on the basis of integration of local ownership and management and participation in community affairs." Despite this flat statement, the Commission thereafter said, in its opinion on Pinellas' petition for rehearing, that

> ". . . the preference accruing to Pinellas as a result of its superiority in these factors [local ownership and ownership-management integration] is *slight* and, although not separately stated, was considered. Our intention was not to deprive, nor did we deprive Pinellas of the slight preference it merits with regard to these factors." Emphasis supplied.

[1] F.C.C. Sixth Report and Order, 17 FED. REG. 3905, 4020 (1952).

Although not expressed, we must assume from the Commission's refusal to disturb the award to Tribune that it found this belatedly acknowledged "slight preference" outweighed by Tribune's "obvious superiority" in the field of local live programs. The Commission's decision had found such superiority in two of six program classifications, agriculture and education.[2] The record clearly demonstrates that the choice between Pinellas and Tribune was regarded as extremely close and that this superiority provided the "decisive" factor in favoring Tribune.[3]

Appellant contends that the Commission's substitution of past performance records for local owner-management in comparing applicants constitutes a reversal of policy which does violence to the important substantive values inherent in local ownership. It also contends that the record does not support the preference to Tribune on programming. But I think our consideration of these contentions, and a final disposition of this review, should await a remand to the Commission for the purpose of supplying an essential conclusion which is missing from the present record. This conclusion relates to the issue of concentration of control and diversification of the media of mass communication. Since the Commission viewed the qualifications of the applicants as closely balanced with respect to the issues it did consider, its resolution of

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[2]Dissenting Commissioner Bartley, however, felt that neither applicant was entitled to a preference based on proposed programming in view of Pinellas' distinct superiority in its provisions for local live news programs."

[3]The Broadcast Bureau excepted to the initial decision because the award to Tribune was "grounded upon completely insubstantial and insignificant reasons" with the exception of the preference in programming. And this preference, the Bureau said, was unsupported by the findings.

an issue which it did not consider might reasonably be expected to affect the result.

The existence of this issue plainly appears from the record. Pinellas is the licensee of one of three radio stations in St. Petersburg, and its principal stockholder publishes one of two daily newspapers there. On the other hand, Tribune is not only the publisher of one of two daily newspapers and licensee of one of two radio stations in Tampa but, in addition, its controlling stockholders own dominant interests in two daily newspapers and two radio stations in Richmond, Virginia, and in a corporation which is an applicant for a TV station there. The Commission concluded that these newspaper and broadcast affiliations of Pinellas and Tribune justified a preference to a third and unsuccessful applicant, Tampa Bay, who had no such affiliations.[5] But the Commission reached no conclusion on whether, as between Pinellas and Tribune, Pinellas was entitled to preference by reason of Tribune's more extensive newspaper and broadcast affiliations. Hence it would appear that the Commission did not consider the comparative merits of Pinellas and Tribune upon the issue of concentration of control and diversification of the media of mass communication.[6]

That this issue is directly related to a critically "important component of the public interest" is not open to question. *Clarksburg Publishing Co.* v. *Federal Communications Comm'n*, — U. S. App. D. C. ——, ——, 225 F. 2d

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[5]Tampa Bay took no appeal.

[6]In his dissent, however, Commissioner Bartley interpreted the Commission's decision as a conclusion that Pinellas was entitled to no preference over Tribune. This conclusion, if it is implicit in the decision, is unexplained. In view of Tribune's more extensive interests in communications media, an explanation of the Commission's reasoning is essential to the validity of that conclusion.

511, 518 (1955). As the Commission has said, "One of the basic underlying considerations in the enactment of the Communications Act was the desire to effectuate the policy against the monopolization of broadcast facilities and the preservation of our broadcasting system on a free competitive basis."[7]

It is true that Pinellas did not challenge, either administratively or before this court, the Commission's failure to reach a conclusion on this issue. Under familiar principles,[8] and a review provision of the Act,[9] it may be argued that our consideration of this issue is precluded. But I think this argument cannot prevail when, as here, it would result in abandonment of our duty to require the Commission to discharge its proper function with respect to "[o]ne of the basic underlying considerations" of the Act. It clearly appears from the scheme of the Act that the Commission may not disregard issues of vital importance to the public interest simply because they are not presented by the parties. Thus § 309 provides for the specification of issues by the Commission, quite apart from those the parties raise, in both comparative and protest proceedings.[10] And, under § 403, the Commission has full power to "initiate an inquiry on its own motion" into any matter before it. The purpose of this broad grant of authority is to enable the Commission to explore all basic issues relevant to the Act's public interest criterion. It

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[7]Multiple Ownership, F. C. C. Report and Order, 18 FED. REG. 7796, 7797 (1953), citing Federal Communications Comm'n v. Sanders, 309 U. S. 470 (1940).

[8]See United States v. Tucker Truck Lines, 344 U. S. 33 (1952); Democrat Printing Co. v. Federal Communications Comm'n, 91 U. S. App. D. C. 72, 78, 202 F. 2d 298, 303 (1952).

[9]66 STAT. 720, 47 U. S. C. § 405 (1952).

[10]66 STAT. 715, 47 U. S. C. § 309(b) and (c) (1952).

expresses congressional recognition of a principle which flows from the inherent nature of administrative tribunals. Unlike courts, regulatory agencies are not confined by the "conventional judicial modes for adjusting conflicting claim—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142-43 (1940).[11]

The Commission's role is not merely that of a referee in an adversary proceeding, who scores points only upon issues selected by the individual contestants and gives the decision to the highest scorer. While this might assure a "right" decision between the contestants, it does not assure a "right" decision in the public interest.[12] The latter decision requires exploration and evaluation of factors vital to such interest, whether or not they have been

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[11]This distinction between the judicial and administrative process has been discussed by the commentators. See LANDIS, THE ADMINISTRATIVE PROCESS 34-46 (1938); DAVIS, ADMINISTRATIVE LAW 476-83 (1951).

[12]In the administrative process "it is imperative that controversies be decided as 'rightly' as possible, independently of the formal record the parties themselves produce. The ultimate test of the administrative is the policy that it formulates; not the fairness as between the parties or the disposition of a controversy on a record of their own making." LANDIS, THE ADMINISTRATIVE PROCESS 39 (1938).

raised by the parties.[13] Any other view would make the Commission's role dependent upon applicants who wish to avoid resolution of issues which, though relevant to the public interest, may reflect adversely on both.[14] It would relegate the Commission to the role of a "traffic officer," without power to protect the "interest of the listening public in 'the larger and more effective use of radio.' "[15]

There is dictum in *Johnston Broadcasting Co.* v. *Federal Communications Comm'n*, 85 U. S. App. D. C. 40, 46-47, 175 F.2d 351, 357-58 (1949), which lends support to the restrictive view of the Commission's role. That case, however, did not involve a failure of the Commission to consider an issue not raised by the contesting applicants. In any event, this dictum cannot be applied where, as here, a basic policy issue under the Act is involved.

In exercising our equity powers to review Commission action, this court, like the Commission, should be mindful of the public interest criterion which the statute prescribes as a condition precedent to a grant. Until we are satisfied that this criterion has been properly applied in

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[13]"A regulatory agency has an affirmative duty to carry out a program, to protect a public interest interest which frequently is otherwise unrepresented. When parties fail to produce needed facts, the regulatory agency typically must take the initiative in aggressively making its own factual investigation." DAVIS, ADMINISTRATIVE LAW 476 (1951).

[14]Suppose, for example, that both of two mutually exclusive applicants had extensive newspaper and radio affiliations, *e.g.*, comparable to those outlined in Clarksburg Publishing Co. v. Federal Communications Comm'n, — U. S. App. D. C., —, —, 225 F.2d 511, 518 (1955). Would the Commission be free to disregard these affiliations simply because neither party saw fit to raise the diversification issue?

[15]National Broadcasting Co. v. United States, 319 U. S. 190, 215-16 (1943).

this case, by a comparison of Pinellas and Tribune on the diversification issue and a conclusion thereon, we should not affirm. I would, therefore, remand the cause to enable the Commission to make this comparison and reevaluate its decision prior to our review.[16]

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[16]66 STAT. 720, 47 U. S. C. § 402(h) (1952); Fleming v. Federal Communications Comm'n, — U. S. App. D. C. —, —, 225 F.2d 523, 526 (1955).

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,545 January Term, 1956.

PINELLAS BROADCASTING COMPANY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

THE TRIBUNE COMPANY,
Intervenor.

Appeal from the Federal Communications Commission.

Before: Prettyman, Bazelon and Washington, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the order of the Federal Communications Commission appealed from in this case be, and the same is hereby, affirmed.

Dated: January 19, 1956.

Per Circuit Judge Prettyman.

Separate dissenting opinion by Circuit Judge Bazelon.

APPENDIX B

The relevant provisions of the Communications Act of 1934, as amended, 47 U. S. C. 151 *et seq.* are:

SECTION 307. (a) The Commision, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

SECTION 310. (b) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

SECTION 402. (b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission. . . .

(g) At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 1009(e) of Title 5.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 689

PINELLAS BROADCASTING COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 22-39) has not yet been reported. The decision of the Federal Communications Commission[1] (R. 160-269)[2] has not been officially reported; it is unofficially reported at 9 Pike & Fischer, Radio Regulation 719.

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[1] The Commission's decision includes its findings of fact, conclusions of law, and order.

[2] In this brief, references to the printed record below appear as R. —.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the decision of the Commission, was entered on January 19, 1956. The petition for a writ of certiorari was filed on February 13, 1956. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

QUESTION PRESENTED

The Federal Communications Commission found that two competing applicants for authority to construct a new television station were each qualified to operate the station; that each, by having provided good service to the area in the prior operation of an AM radio station, had demonstrated its responsiveness to the area's needs; and that each would provide adequate television service. It further found, however, that one applicant was to be preferred because it proposed superior local "live" programming.

The question presented is whether the Commission abused its discretion in concluding that the public interest would best be served by the grant to the applicant which proposed the superior local "live" service, even though the majority of that applicant's stock was not owned by local residents whereas the other applicant was locally owned.

STATUTE INVOLVED

Pertinent provisions of the Communications Act of 1934 are set forth in the Appendix to the petition.

STATEMENT

Under the Federal Communications Commission's nationwide allocation of television channels (Section 3.606, Rules and Regulations of the Federal Communications Commission, 47 C. F. R. 3.606), Channel 8 is available for a station in either Tampa or St. Petersburg, Florida. Petitioner Pinellas Broadcasting Company, The Tribune Company, and Tampa Bay Area Broadcasting Corporation filed applications for a permit to construct a new television broadcast station on that channel. Since the three applications were mutually exclusive, the Commission designated them for comparative hearing.

After full administrative proceedings (including a lengthy hearing, an examiner's initial decision, exceptions thereto and supporting briefs, and oral argument before the Commission, R. 161-162), the Commission (three Commissioners dissenting), on August 4, 1954, granted the application of Tribune and denied those of the other two applicants (R. 264-265).[3] In a lengthy opinion (R. 160-269), the Commission discussed the various factors upon which each applicant relied as grounds for preference.[4] It held that each applicant met the basic qualifications for licensees, that each would comply with the Commission's regulations, and that each

[3] In his initial decision, the examiner also had recommended the grant of Tribune's application (R. 161).

[4] Since Tampa Bay did not appeal from the denial of its application, we shall not discuss the Commission's findings as to its qualifications.

would provide a programming service which would meet the needs of the area (R. 241), including both Tampa and St. Petersburg (R. 162-163).

In evaluating the respective qualifications of Pinellas and Tribune, the Commission ruled that where an applicant had a past record of demonstrated service in the public interest, this was a better guide to its ability to carry out its proposals and to meet the service needs of the area than such factors as local residence, integration of ownership and management and participation in local activities (R. 250). The Commission found that both Pinellas and Tribune had provided satisfactory service to the area in the operation of standard broadcast (AM) stations, and that their programming on those stations demonstrated keen awareness of the needs and interests of the communities served (R. 196-201). In view of this fact, neither was found to merit a preference with respect to its ability to carry out its proposals or meet the continuing service needs of the community (R. 250-253).[5]

On the important factor of the applicants' prospective program proposals, the Commission concluded (R. 253-257) that while both Pinellas and Tribune planned a diversified, well-balanced program service, the local "live" programming contemplated by Tribune warranted a significant preference. In reaching this conclusion, the Commission reviewed in detail the facts with respect

[5] The Commission gave Tribune a slight preference for the greater size and better arrangement of its studios, which it found would give Tribune greater freedom of action in its programming, particularly with respect to its proposed local "live" program service (R. 247-249).

to the applicants' various proposed program classifications.[6] The Commission found that Tribune not only proposed substantially more "live" programming than Pinellas,[7] but that Tribune's educational programming reflected its excellent record of cooperation with the educational institutions in the area, which was superior to that of Pinellas (R. 255). It further found that Tribune's proposed agricultural programs would better meet the needs of the extensive agricultural areas which both applicants intended to serve (R. 255-256). Upon an over-all evaluation of the local programs, which the Commission described as "the indicia of a station's sensitivity to local needs," it concluded that Tribune proposed "a more extensive schedule designed to mirror the many phases of life in the area" (R. 256).[8]

On appeal, the court of appeals affirmed the Commission's order. The court held that the Commission had not abused its discretion in treating Tribune's "comprehensive local live programming" as the "decisive factor" (Pet. 23), and in

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[6] These categories were news, sports, religion, education, agriculture and women's affairs.

[7] The Commission found that Tribune proposed that 43.82% of its programs would be in that category, as against 33% by Pinellas. It pointed out, however, that this factor, in and of itself, was not determinative of relative superiority.

[8] In a Memorandum Opinion denying rehearing, the Commission again pointed out, in rejecting Pinellas' contention that local residence and integration of ownership and management should have been given greater weight, that such factors, while not to be disregarded, are not so important where a past record of performance is available upon which to judge the quality of future performance. Pinellas' slight superiority on these factors was thus found, in the light of Tribune's excellent AM record, to be of "lesser significance" in evaluating future performance (R. 271-273).

refusing to give "controlling effect to the local ownership of Pinellas contrasted with the absentee ownership of Tribune" (Pet. 24). The court pointed out (Pet. 25) that the selection of one of a number of qualified applicants is "basically a matter of judgment, often difficult and delicate, entrusted by the Congress to the administrative agency." The court noted (*ibid.*) that the Commission apparently was changing its view as to the relative significance of local ownership, but ruled that in so doing the Commission was "operating within the area of legislative-executive judgment," in which the courts "cannot interfere so long as the process, the premises, and the judgment are not arbitrary." The court concluded (Pet. 26) that the bases for the Commission's selection were "clearly set out and are understandable," are "reasoned and not capricious," and "rest upon evidence put in the record," and that the Commission's decision "does not appear in any respect to be clearly contrary to the public interest" (Pet. 30).[9]

ARGUMENT

The basic issue in this case is whether the Commission properly held that the grant to Tribune of a construction permit to build a new television station in the St. Petersburg-Tampa area would better

[9] Judge Bazelon, dissenting, was of the view that the case should be remanded to the Commission to consider whether, as between Pinellas and Tribune, "Pinellas was entitled to preference by reason of Tribune's more extensive newspaper and broadcast affiliation" (Pet. 35), even though he recognized that Pinellas "did not challenge, either administratively or before this court, the Commission's failure to reach a conclusion on this issue" (Pet. 36).

serve the public interest, convenience and necessity than a grant to petitioner. That decision was made after a full comparative hearing, and on the basis of detailed findings of fact in which the Commission fully considered the comparative qualifications of the applicants. The Commission also carefully enunciated the bases for its conclusions. Both the factual bases upon which the Commission's decision rested, and the reasonableness of the policy judgments which it embodied, have been thoroughly reviewed by the court of appeals, which held in a careful opinion that they fully support the award. The case presents no novel or substantial questions warranting further review by this Court.

1. Petitioner's principal contention (Pet. 6-15) is that the Commission "grossly misapplied the pertinent statutory standard" and "departed from established policy in an arbitrary manner" (Pet. 12) because it failed to give the same weight to the factor of local ownership and management which it accorded that factor in previous decisions. Although the Commission has given preference to locally owned and managed applicants—particularly where the applicants had no record of past service to the community, *e. g., Midland Broadcasting Co.,* 12 F. C. C. 611, 622—it has never, as petitioner itself recognizes (Pet. n. 11, p. 10) deemed that single factor to be determinative. Indeed, in at least two other cases,[10] the Commission previ-

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[10] *Hearst Radio Inc.,* 6 Pike & Fischer, Radio Regulation 994, 1027; *WJR, The Goodwill Station, Inc.,* 9 Pike & Fischer Radio Regulation 227, 260 c-d.

ously had expressed the view that a record of past satisfactory service constitutes a more reliable guide as to whether an applicant will provide future satisfactory service than local ownership and management. The principal significance of the latter fact is that a station which is locally owned and managed is more likely to be responsive to the needs of the community than one with absentee ownership and management. But where, as here, both applicants for a television station have already demonstrated their responsiveness to community needs in operating existing radio stations, the Commission was justified in concluding that no significant preference should be given to the applicant which is locally owned and managed.

Under the statute, the Commission has broad discretion to determine which of several applicants for a broadcasting license would best serve the public interest. We submit that it was "within the allowable area of discretion" (*Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U. S. 358, 362) for the Commission to conclude that, as between two applicants having satisfactory records of prior radio operations in the area, it would give less weight to the factor of local ownership and management than to the factor of local "live" programming, because such programming is "the indicia of a station's sensitivity to local needs" (R. 256). And this conclusion, otherwise reasonable, does not become arbitrary or invalid merely because in prior cases involving different facts the Commission deemed the factor of local

ownership more significant. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223.

In describing the Commission's judgment in this case as "political, in the high sense of that abused term" (Pet. 25), the court of appeals did not, as petitioner suggests (Pet. 7), abdicate its function as a reviewing court. On the contrary, this statement was only a recognition of the fact that Commission judgments of this type necessarily involve policy questions which Congress has committed to the agency's discretion, and that the scope of judicial review of such judgments is extremely limited.[11] Congress has given the Commission broad discretion in evaluating the comparative qualifications of applicants to operate broadcasting facilities in the public interest, and the test upon review is whether, on the basis of the whole record, the Commission has reasonably exercised that discretion in making the evaluation. *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 229; *United States* v. *Pierce Auto Lines*, 327 U. S. 515; *National Broadcasting Co.* v. *United States*, 319 U. S. 190; *Johnston Broadcasting Co.* v.

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[11] Contrary to petitioner's contention (Pet. 7-8), the decision below is not inconsistent with that of another panel of the same court in *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 511 (C.A.D.C.). *Clarksburg* did not involve review of a Commission decision, rendered after a full hearing, selecting among competing qualified applicants for a television station license. The court held in *Clarksburg* only that, under Section 309(c) of the Act, the Commission had erred in refusing to hold an evidentiary hearing on substantial issues raised in a protest to the grant without hearing of an application for a television station.

Federal Communications Commission, 175 F. 2d 351 (C. A. D. C.). We submit that the court properly concluded that, tested by this standard, the Commission had not abused its discretion here.[12]

2. Petitioner further argues (Pet. 15-16) that the Commission erred in failing to compare Pinellas and Tribune with respect to their interests in other media of mass communications, namely, radio and newspapers. In the first place, as petitioner concedes (Pet. 15), this issue was not raised before either the Commission or the court below. Petitioner, therefore, is in no position to urge it before this Court. Secondly, we think that the Commission's decision, fairly read, indicates that the Commission deemed the difference between Pinellas and Tribune in this respect too slight to justify any preference.[13] The Commission pointed

[12] Petitioner suggests (Pet. 12-15) that, under Section 310(b) of the Act, Tribune was disqualified from receiving the grant because it intended to divest itself of responsibility for operating the station. That Section prohibits the transfer of a license "or any rights thereunder" without Commission approval. The Commission found, however, that two members of the local management group which would operate the station were members of Tribune's board of directors, and that the proposed general manager of the station would work closely with those two members (R. 166-167). It therefore concluded that there would be no abandonment of operating responsibility (R. 250-251)—the same conclusion which it had reached in prior cases involving similar arrangements. See *WJPS, Inc.*, 12 F.C.C. 121, 127-128; *Radio and Television Broadcasting Co. of Idaho*, 6 Pike & Fischer, Radio Regulation 629, 642-643. The court of appeals upheld the Commission's factual determination that there would be no abandonment of operating responsibility (Pet. 24-26), and we submit that its holding was clearly correct.

[13] Commissioner Bartley, in his concurring opinion on rehearing, so construed the decision (R. 282).

out (R. 261-263, Pet. App. 31-32) that Pinellas and Tribune each owned one of the two English-language newspapers and one of the two full-time radio stations in its community; in addition, the controlling stockholders of Tribune also had newspaper and radio interests in Richmond, Virginia. It found that the third applicant (Tampa Bay), which had no interests in other media of mass communication in the area, was entitled to preference over both Pinellas and Tribune in this regard, but that such preference was not determinative of the choice of applicants. We submit that the court of appeals correctly held (Pet. 30, n. 6) that the Commission had given adequate consideration to the respective radio and newspaper interests of Pinellas and Tribune.

3. Finally, petitioner contends (Pet. 16-20) that there is not adequate evidentiary support for the Commission's finding that Tribune's local "live" programming was superior to that of Pinellas. This argument rests upon the contention that Tampa and St. Petersburg are different communities with different needs, and that the Commission therefore was required to consider and make findings with respect to the relative abilities of each applicant to serve each community separately.

But petitioner never requested the Commission to treat the two communities separately, and the court of appeals correctly held (Pet. 26-28) that if petitioner had desired to urge that point before the Commission, it should have done so, and that it could not raise it for the first time on appeal. Fur-

thermore, we believe that the Commission plainly was justified in treating the two communities as one area for purposes of comparing the applicants' proposed programming (R. 217-229, 253-256). As the court below noted (Pet. 28-29), both applicants proposed to serve both communities,[14] and, since they both planned "not only area-wide signal reception but also area-wide expression opportunities" (Pet. 29), the Commission was not arbitrary in treating the two communities as parts of a single broadcasting area for purposes of evaluating the proposed local "live" programming.

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[14] This case, accordingly, is unlike *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U.S. 358, where the two applicants in Easton and Allentown, Pennsylvania, respectively, would not serve each other's communities. In that situation there was a question under Section 307(b) of the Communications Act (requiring the Commission to grant broadcasting licenses so as to provide a "fair, efficient, and equitable distribution of radio service" among the states and communities) as to which community had the greater need of a station. As petitioner concedes (Pet. 18, n. 30), however, there is no issue under that section in the instant case.

CONCLUSION

The decision below is correct, no important question warranting further review by this Court is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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